

July 10, 2007

Mr. Jeff Bruette
128 Patriot Drive, Units 8-10
Middletown, DE 19709

Re: **Freedom of Information Act Complaint
Against Town of Middletown**

Dear Mr. Bruette:

On May 21, 2007, our Office received your complaint under the Freedom of Information Act, 29 *Del. C.* Ch.100 ("FOIA"), alleging that the Town of Middletown ("the Town") violated the public notice requirements of FOIA by amending the agenda for a meeting scheduled for May 7, 2007 after the initial posting of the agenda to add two matters of public business.

You provided us with a copy of the revised agenda (as of April 30, 2007) for the Town Council's May 7, 2007 meeting. According to your complaint, the revised agenda added for discussion: Item 10. "Public Hearing – Adopt an Ordinance to enact a new policy for Freedom of Information Act Requests." The revised agenda noted that "[t]his item was not part of the original agenda which was previously posted on April 17, 2007. This item is being added to the agenda. The delay occurred as a result of an Administrative oversight."

The Revised Agenda (as of April 30, 2007) also added as Item 11: "Public Hearing – Adopt an Ordinance to establish a Riparian Buffer Area Conservation District in the Town of Middletown." The revised agenda noted that "[t]his item was not part of the original agenda which was previously

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posted on April 17, 2007. This item is being added to the agenda. The delay occurred due to the time of the preparation of the final draft."

According to your complaint, the revised agenda "for the May 7 meeting would initially appear to be in compliance with the seven day notification period. . . . However, if you refer to the footnote in the lower left corner of the agenda, it is dated '5/1/2007/dsb 11:05:06 AM.' This date on May 1 provides only six days public notice."

By letter dated May 21, 2007, our Office asked the Town to respond to your complaint by May 31, 2007. Our Office received the Town's response on May 29, 2007.

According to the Town, the "agenda for the May 7, 2007 meeting was initially posted on April 17, 2007, well beyond the seven day requirement in 29 Del. C. §10004(e). . . . A revised agenda was subsequently posted on April 24, 2007" to add two new items for public discussion including the adoption of a new FOIA policy. According to the Town, Kristen Krenzer "the person responsible for publishing the agenda simply neglected to include [the new FOIA policy] when she prepared the original agenda of April 17, 2007."

According to the Town, the revised agenda posted on April 24, 2007 also added the Riparian Buffer ordinance which "was not originally posted due to a delay in the preparation of the final draft. . . . [T]he Town and the Appoquinimink River Association were still considering public comments and finalization had not been completed prior to the original posting of the April 17, 2007. However, it was imperative that this matter be placed on the May 7, 2007 agenda because the Federal government had established a deadline for the Federal grant of May 31, 2007."

According to the Town, it revised the agenda for the May 7, 2007 meeting a second time on April 30, 2007 but that revised agenda was "not actually posted until the morning of May 1, 2007.

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However, the revision had absolutely nothing to do with either the FOIA policy or the Riparian Buffer ordinance. To the contrary, the only addition to the agenda was a new Item 7, 'Public Hearing – Route 299, Willow Grove Mill – Concept Plan for the Willow Grove Mill Townhouse Community on a R-3 Parcel.'

The second revised agenda noted that "[t]his item was not part of the original agenda which was posted on April 17, 2007. This item is being added to the agenda. The delay occurred as a result of the developer's revision to the 276-unit condominium development previously proposed for the property."

RELEVANT STATUTES

FOIA provides that "[a]ll public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof." 29 *Del. C.* §10004(e)(2).

FOIA provides that "[w]hen the agenda is not available as of the time of the initial posting of the public notice it shall be added to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth in the agenda." *Id.* §10004(e)(5).

LEGAL AUTHORITY

"'An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether

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to attend the meeting and voice their ideas or concerns.'" *Att'y Gen. Op.* 05-IB11 (Apr. 11, 2005) (quoting *Att'y Gen. Op.* 03-IB22 (Oct. 6, 2003) (quoting *Att'y Gen. Op.* 97-IB20 (Oct. 20, 1997))).

"FOIA allows a public body to amend an agenda" to add a matter for public discussion "when it 'is not available at the time of the initial posting of the public notice' so long as it is added 'to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth in the agenda.'" *Att'y Gen. Op.* 05-IB23 (Aug. 15, 2005) (quoting 29 *Del. C.* §10004(e)(5)).

Our Office has "cautioned that this exception [to the normal seven-day notice rule] does not authorize a public body to amend the agenda prior to a meeting for any reason, but rather applies 'to add items that come up suddenly and cannot be deferred to a later meeting.'" *Att'y Gen. Op.* 05-IB15 (June 20, 2005) (quoting *Att'y Gen. Op.* 05-IB09 (Apr. 11, 2005)).

In *Att'y Gen. Op.* 05-IB15, the City Council amended the agenda the day before a meeting to add a proposed subdivision. The amended agenda stated that the "reason for delay in posting" was "due to late arrival of information." Because the City amended the agenda at least six hours in advance as required by FOIA, the "issue then is whether the City gave sufficient reason why it could not have included the subdivision in the agenda when it was originally posted on April 7, 2005." *Id.* Our Office determined that the City violated the public notice requirements of FOIA because there was no "evidence in the record that consideration of the proposed subdivision by the Council was such a pressing matter that it could not be deferred to a later date." *Att'y Gen. Op.* 05-IB15.

In *Att'y Gen. Op.* 06-IB08 (Apr. 6, 2006), the School District "did not receive the bid specifications from its construction manager (EDIS) until December 15, 2005 (five days before the scheduled December 20, 2005 public meeting). The School District needed to approve the bid

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specifications before sending them to prospective bidders on a project involving four separate contracts." If the School District "had not approved the EDIS bid specifications at its meeting on December 20, 2005, that would have delayed the construction project because the next regularly scheduled meeting of the School District was not until January 24, 2006."

Under those circumstances, our Office determined that the School District did not violate the public notice requirements of FOIA because "there was a sufficient reason for the School District to amend the agenda five days before the December 20, 2005 meeting." *See also Att'y Gen. Op. 05-IB23* (Aug. 15, 2005) ("We understand that any delay in the approval of the change order could have resulted in a default on the contract, and that the Council was not scheduled to meet again until May 31, 2005.").

In both of those cases, the public body amended the agenda less than seven days before a meeting. When a public body amends an agenda more than seven days in advance of the meeting, we do not believe that FOIA imposes any burden to show that the matter came up unexpectedly and could not be deferred to a later meeting. FOIA is concerned that the public have at least seven days' notice of a meeting so they can prepare and plan to attend. If a public body initially posts the agenda more than seven days in advance, it is consistent with the general notice requirements of FOIA that the public body be free to amend the agenda to include additional matters of public business up until the seven-day mark so long as the matter came up after the initial posting. The notice provided to the public would be the same as if the public body had waited until precisely seven days before the meeting to post the initial agenda to include those additional matters.

Our Office determines that the Town did not violate the public notice requirements of FOIA by amending the agenda for the May 7, 2007 meeting on April 24, 2007 to include the Riparian

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Buffer ordinance and the new FOIA policy. Those matters of public business came up after the initial posting of the agenda on April 17, 2007 and the Town complied with the FOIA's requirement that "the reasons for the delay in posting shall be briefly set forth in agenda." 29 *Del. C.* §10004(e)(5).

Our Office, however, feels quite differently about the Town's amending the agenda for the May 7, 2007 meeting a second time on May 1, 2007 to include the Willow Grove Mill Townhouse Community only six days in advance of the meeting. *See Ianni v. Department of Elections of New Castle County*, 1986 WL 9610, at p.5 (Del. Ch., Aug. 29, 1986) (Allen, C.) (FOIA's public notice requirements should not "be read to count the day of posting as one day's notice"). When a public body amends the agenda less than seven days before the meeting, we believe that FOIA places the burden on the public body to show: (1) the matter of public business came up unexpectedly after the initial posting; and (2) the matter requires the immediate attention of the public body and cannot be deferred to a later date.

Our Office accepts the Town's explanation that the Willow Grove Mill matter came up after the posting of the original agenda for the May 7, 2007 meeting "because of a revision to the developer's 276 unit condominium development." But the Town has not met its burden of proof to show why this matter of public business was of such a pressing nature that the Town could not defer it for discussion at a later meeting.

Our Office determines that the Town violated the public notice requirements of FOIA by posting an amended agenda on May 1, 2007 to include the Willow Grove Mill development. The Town can remediate this violation by re-noticing the Willow Grove Mill development for new and substantial reconsideration at a public meeting within thirty days of the date of this letter.

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CONCLUSION

For the foregoing reasons, our Office determines that the Town did not violate the public notice requirements of FOIA by amending the agenda for the May 7, 2007 meeting on April 24, 2007 to include the Riparian Buffer ordinance and the new FOIA policy because the public had more than seven days' notice of those two matters of public business and the Town stated the reasons for the delay in posting the amended agenda.

Our Office determines that the Town violated the public notice requirements of FOIA by posting an amended agenda for the May 7, 2007 meeting six days in advance without sufficient reason. The Town can remediate that violation by re-noticing the Willow Grove development matter in strict compliance with the public notice requirements of FOIA for new and substantial reconsideration within thirty days of the date of this letter. We ask the Town Solicitor to write to our Office within ten days after the Town completes remediation.

Very truly yours,

W. Michael Tupman, Esquire
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

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cc: The Honorable Joseph R. Biden, III
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